Supreme Court, U.S.
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No. 09-_____

In The

Supreme Court of the United States

LINDA LEWIS, as mother and personal representative of the estate of her son, Donald George Lewis,

Petitioner,

v.

CITY OF WEST PALM BEACH, FLORIDA; RAYMOND SHAW, ROBERT LEROY ROOT, III, RANDALL MAALE, THELTON LUKE, and AUDREY DUNN, Police Officers for the City of West Palm Beach Police Department, in their individual capacities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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October 5, 2009

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QUESTIONS PRESENTED FOR REVIEW

Whether police officers effecting a non-criminal detention of a mentally disturbed person by applying a "hog-tie," binding his wrists and ankles to each other behind his back as he is pinned to the ground with pressure on his neck, after which he died, are entitled to qualified immunity.

Whether the Eleventh Circuit violated *Hope v. Pelzer*, 536 U.S. 730 (2002), by requiring more than "fair warning" that police officers' actions violated the Fourth Amendment in granting them qualified immunity when, according to the district court, they unnecessarily inflicted force to a civil detainee's neck who then, according to a forensic pathologist, died from asphyxiation caused by neck compression.

Whether the City of West Palm Beach has municipal liability for the failure to train police officers on the proper use of ankle hobbles, the device used to "hog-tie" the deceased civil detainee in this case.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the lower court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner : Linda Lewis

Defendants-Appellees and Respondents : City of West Palm Beach, Florida, Raymond Shaw, Robert LeRoy Root, III, Randall Maale, Thelton Luke, and Audrey Dunn

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II. The Eleventh Circuit's Judgment Conflicts with this Court's "Fair Warning" Standard Established in *Hope v. Pelzer*, 536 U.S. 730 (2002).

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PETITION FOR A WRIT OF CERTIORARI

Linda Lewis respectfully petitions for a Writ of Certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The published opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated March 11, 2009, is officially reported at 561 F. 3d 1288 (11th Cir. 2009), and is reproduced at App. A, 1a-12a.

The opinion Granting Defendants' Motion for Summary Judgment, dated March 19, 2008, is reproduced at App. C.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on March 11, 2009. This petition is timely filed under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 and Rule 13.3 because it is filed within 90 days of the order denying the timely petition for rehearing *en banc* before the Eleventh Circuit. In addition, the petition is timely filed under Supreme Court Rule 13.5 because this Court granted petitioner's application for a sixty day extension of time, until October 5, 2009, in which to file her petition for writ of certiorari. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).

For purposes of Supreme Court Rule 14.1(g)(ii), the Court of first instance had federal question jurisdiction

under 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provision involved is the Fourth Amendment to the United States Constitution, which provides in pertinent part that, "The right of the people to be secure in their persons, ..., against unreasonable . . . seizures, shall not be violated . . . ." U.S. Const., amend. 4.

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES

The tragic events giving rise to this case occurred on October 19, 2005, and although they were not broadcast, the events were captured on videotape by a camera crew employed by the "COPS" television program. At shortly after 1:00 that morning, concerned citizens called 911 to report that a man, later identified as petitioner's son, Donald Lewis, needed assistance. Respondent Officer Raymond Shaw, who was accompanied in his patrol car by the camera crew, was the first officer to encounter Donald Lewis. Shaw announced a "Signal 20" to the radio dispatcher, which describes a mentally disturbed citizen, and not a criminal suspect. On foot, Shaw confronted Lewis, who according to the district court, was "shirtless and apparently distraught, stumbling onto the road and attempting to flag down passing vehicles." App. C, 17a. Shaw directed Lewis to lie down on the side of the road and, breathing heavily and grunting incoherently, Lewis did so.

Intermittently obeying Shaw's directions to relax and then gesticulating wildly and thrashing on the shoulder of the road, Lewis eventually stood up and ran, with arms raised and yelling unintelligibly, while traffic stopped. Shaw attempted to pull Lewis off the roadway, and then forced him to the ground in the center of the road. Lewis ignored Shaw's requests to place Lewis' hands behind his back, but Shaw maneuvered Lewis into a prone position, placed a knee on Lewis' back, and brought Lewis' hands behind his back to apply handcuffs.

Arriving on the scene at that point, respondent Officer Robert Root then placed his knee on Lewis' upper back and neck, between Lewis' shoulder blades, while Lewis continued to groan. After one minute of maintaining Lewis in this fashion, Root retrieved a leg restraint from his patrol car while Shaw continued to hold Lewis down in a prone position. (The leg restraint is also known as an "ankle hobble"; it is a nylon strap designed to bind an arrestee's ankles tightly together. One end of the strap has a clip that allows the full length of the strap to be secured to handcuffs after the ankles are bound.) Respondent Officer Thelton Luke then arrived, and he assisted Root in binding Lewis' ankles with the restraint. Lewis continued breathing heavily and moaning. The three officers then picked up Lewis, whose wrists and ankles were bound, and carried him in the same horizontal position to a driveway. Placed face down, Lewis continued to writhe on the cement.

According to the district court,

> Then, while Officer Luke and Officer Root kept their knees on Lewis' back, Officer

> Shaw picked up Lewis' bound legs and pushed them down and forward. Lewis suddenly became silent and motionless. The officers then tied Lewis' hands and feet together behind his back in a "hogtied" position.

Id. at 19a. Respondent Sergeant Randall Maale directed officers to "hook him up," that is, to connect the loose end of the leg restraints to the handcuffs. The officers then pulled the restraints so that Lewis' hands and feet were in contact with each other behind his back. Realizing that Lewis was unconscious, Maale ordered the restraints removed. Efforts to resuscitate Lewis were unsuccessful, and he was later pronounced dead.

Relying on this Court's opinion in *Scott v. Harris*, 550 U.S. 372 (2007), Lewis filed the videotape at the summary judgement stage. In addition to the above facts, the videotape and accompanying audio revealed that, before any other officers arrived, Shaw applied pressure to Lewis' neck, and Lewis temporarily lost consciousness. The videotape also shows that Root placed his knee on the back of Lewis' neck, and soon thereafter Lewis yelled, "Help. Officers. Air! Help! Up! Oh God. Oh God. Oh God. You're killing me! *See* 04.48.45 (videotape counter). Later, Lewis cried, "My name is Donald Lewis and the cops are killing me." *Id.* at 04:50:01.

At the side of the road, the videotape reveals, Root, holding the loose, clipped end of the leg restraint, asked Maale, "Want me to hook it?" Maale replied, "That would be good." *Id.* at 04:51:00. Lewis repeated, "Don't kill me! *Id.* at 04:51.01. As Sergeant Maale

watched, Shaw yelled to Lewis, "Lift your feet up!" Respondent Officer Audrey Dunn then assisted Shaw, Root, and Luke by bracing Lewis' legs in the air with her leg. Then, Dunn, Root, and Luke assisted as Shaw, with intense physical effort, forced Lewis into the air and then pushed him downward, face first. *Id.* at 04:51:15-04:51-20. Lewis did not move after this point.

Petitioner's forensic expert, Dr. Michael Baden, formerly the chief medical examiner for the City of New York, concluded that the cause of Donald Lewis' death was asphyxia due to neck compression. Dr. Baden relied on the autopsy findings, and 158 autopsy photographs, revealing petechial hemorrhages in both eyes, and prominent fresh hemorrhages in the soft tissues of the larynx. Dr. Baden noted considerable damage to the front of Lewis' neck, demonstrating that "considerable pressure was put on the front and back of Mr. Lewis' neck." Evidence that neck compression caused Lewis' death included hemorrhage around the right side of the hyoid bone, a very large hemorrhage on the posterior pharyngeal muscle, extending along the right thyroid and cricoid cartilages, hemorrhages in the back of the pharynx, and hemorrhages in the back of the larynx and beneath the hyoid bone. All of these areas of hemorrhage "had to have blunt force applied, whether a blow or a squeeze that caused bleeding." The petechial hemorrhages in the Lewis' eyes were caused by pressure on the neck and chest that obstructed blood flow to Lewis head.

II. DECISION OF THE DISTRICT COURT

Relying on the videotape, the district court found that a reasonable jury could conclude that Shaw, Root, and Luke violated the Fourth Amendment. The court

held that these officers inflicted excessive force when they repeatedly placed their knees on Lewis' upper back or neck when Lewis was lying prone. For instance, even after Lewis was handcuffed and a knee on Lewis' neck and back no longer served any purpose, "Root continued to forcefully depress his knee on the back of Lewis' neck for nearly one additional minute," and "[d]uring this time, Lewis squirmed and groaned as though in pain." App. C, 24a. The court found as well that Shaw, Root and Luke placed their knees on Lewis unnecessarily. The court found that a reasonable jury could find that this technique amounted to excessive force, observing, "Here again, because Lewis' hands were cuffed behind his back and his feet already tied together, *there appears to be no reason for Officer Root and Officer Luke to employ such a painful and potentially dangerous technique*." *Id.* at 25a (emphasis added).

Likewise, the court found that a reasonable jury could conclude that Shaw violated the Fourth Amendment later during the seizure. As the district court described,

> At one particular point while Lewis was handcuffed and lying face-down, Officer Root and Officer Luke had their knees on Lewis' back. While attempting to apply the hobble to Lewis' legs, *Officer Shaw picked up Lewis' legs in an obviously unnatural and dangerous position and violently shoved them forward, placing tremendous stress on Lewis' spine and neck*. At just that moment, Lewis, who had been continuously groaning and writhing, suddenly became silent and

motionless.

Id. (emphasis added). The district court concluded that,

> [R]egardless of whether the actions of the officers caused Lewis' death, a reasonable juror could find that the officers used constitutionally excessive force under the circumstances. After Lewis was already handcuffed and effectively immobilized, there was simply no need for the officer to kneel on Lewis' upper back and neck. Nor was there a need for Officer Shaw to pick up and shove Lewis' legs down toward his awkwardly contorted body. The officers were attempting to either further restrain Lewis, or to place him in a seated position. Officer Shaw's actions, combined with Officer Root's and Officer Luke's knees on Lewis' back, did not help achieve either of these possible goals.

App. C, 29a.

Accordingly, the district court concluded that petitioner satisfied the first step of the two-part standard of *Saucier v. Katz*, 533 U.S. 194 (2001), as a reasonable jury could find a violation of the Fourth Amendment. However, the district court concluded that petitioner failed to satisfy *Saucier*'s second step, as prior authority did not clearly establish that the Fourth Amendment was violated under these facts. The district court found that the respondent officers did not have "'fair warning that their . . . .treatment of [the plaintiff] was unconstitutional.'" *Id.* at 30a,

quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002). The district court found that petitioner failed to satisfy any of the three avenues available for demonstrating that the Fourth Amendment right respondents Shaw, Root, and Luke violated was clearly established: the existence of prior caselaw finding a Fourth Amendment violated in indistinguishable factual circumstances; the existence of a prior case articulating a sufficiently broad principle of law; or a showing that the officers' conduct was "so egregiously excessive that any reasonable officer would have understood it to be unconstitutional, even in the absence of any relevant case law."*Id.* at 31a.

The district also granted the motion for summary judgment filed by the City of West Palm Beach, holding that petitioner failed to demonstrate under *City of Canton v. Harris*, 489 U.S. 378 (1989), that the City failed to train the officers adequately in the safe application of the leg restraint, so as to avoid "hogtying" arrestees which, as petitioner claimed, caused one of the Fourth Amendment violations.

III. DECISION OF THE ELEVENTH CIRCUIT

On appeal, the Eleventh Circuit affirmed the order granting summary judgment to respondents. Relying on this Court's recent opinion in *Pearson v. Callahan*, 555 U.S.___, 129 S. Ct. 808 (2009), which permits courts to begin with the second step of *Saucier*'s analysis, the Eleventh Circuit opted not to reconsider the Fourth Amendment issue. Instead, the court reasoned that, "Even if the officers' actions violated Lewis' Fourth Amendment rights, the appellant did not demonstrate that the officers' conduct was an intrusion

on a clearly established right." App. A, 6a. Observing, like the district court, that a citizen can make this showing in three possible ways, the Eleventh Circuit reasoned that case law does not provide the necessary precedent, either specifically on through broad principles, to clearly establish the Fourth Amendment rights in this case.

Thus, the Eleventh Circuit held, Lewis must demonstrate that "the officers' conduct was so egregious and unacceptable so as to have blatantly violated the Constitution . . . ." *Id.* at 7a. The court reasoned that this is a "narrow exclusion," and that a citizen must show that the officer's conduct is "'so far beyond the border between excessive and acceptable force that the official had to know he was violating the Constitutional even without case law on point.'" *Id.*, *citing Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997). The Eleventh Circuit concluded that, although the officers testified that Lewis "was not a danger to them" and that "application of the hobble may not have been entirely necessary," the respondents' conduct was "not so violent and harsh to be considered an egregious violation of a constitutional right." *Id.* at 7a-8a. Thus, the Eleventh Circuit affirmed the district court's holding that the officers were entitled to qualified immunity on *Saucier's* second step.

The Eleventh Circuit also affirmed the order granting summary judgment on the municipal policy claim. The court reasoned that, unlike appropriate training on the use of firearms, the need for training on the proper use of hobble restraints and the proper placement of weight on an arrestee's back during the restraint process was not "so obvious" that it "requires proactive training by the City to ensure avoidance of

constitutional violations." *Id.* at 9a. Thus, the court declined petitioner's offer to apply *City of Canton* to the training deficiencies petitioner relied upon for his municipal policy claim.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE DECISION OF THE FIFTH CIRCUIT DENYING QUALIFIED IMMUNITY IN INDISTINGUISHABLE CIRCUMSTANCES

This Court should grant the petition pursuant to Sup. Ct. R. 10(a) because the decision of the Eleventh Circuit conflicts with the decision of the Fifth Circuit on the same important matter.

In *Gutierrez v. City of San Antonio*, 139 F. 3d 1441 (5th Cir. 1998), the Court of Appeals for the Fifth Circuit reversed the district court's order granting summary judgment to defendant police officers raising a qualified immunity defense in indistinguishable factual circumstances. In *Gutierrez*, the family of a man who died in police custody brought a Fourth Amendment claim against police officers who hog-tied him during his detention. *Id.* at 443-44. According to the medical examiner, the cause of death was the presence of various narcotics in his system, and a contributory cause of death was that the arrestee was "hog tied" and left face down on the back seat of a police car. *Id.* at 444.

According to the *Gutierrez* court, the officers first

saw Gutierrez shirtless and "stumbling around" in an intersection. *Id.* at 442. They watched as he ran around in circles in the middle of the street and then slipping and falling on his side. *Id.* at 443. As the officers approached, Gutierrez began swinging his arms wildly and then crawling toward them on his hands and knees. *Id.* Gutierrez claimed he hand been shot, although the officers found no wounds, and then claimed that he "shot some bad coke." *Id.* Gutierrez refused to cooperate with EMS technicians, and then began to kick at the windows of a police vehicle once officers concluded that they would have to drive him to the hospital. *Id.* Consequently, the officers decided that Gutierrez must be "hog-tied." *Id.* The officers used a "leg-restraint device," described as "a nylon rope with a loop on one end and a clasp on the other ('hog-tie')." *Id.* According to the *Gutierrez* court, one officer "placed the loop around Gutierrez's feet, and [another officer] linked the clasp around the handcuffs, drawing Gutierrez's legs backward at a 90 degree angle in an 'L' shape, thereby 'hog-tying' him." *Id.* (In this case, respondents bound Lewis' legs and hands so that they were in contact with each other, and thus his legs were pulled up in a far more acute angle than 90 degrees.)

The Fifth Circuit concluded that the Fourth Amendment right Gutierrez's survivors claimed was clearly established in those circumstances, and accordingly reversed the district court's order granting the officers qualified immunity. *Id.* at 446-47. The Fifth Circuit first rejected the officers' argument that the right to be free from hog-tying was not clearly established because neither this Court nor any circuit had specifically found that hog-tying constituted

excessive force. *Id.* at 445. A reasonable police officer, the *Gutierrez* court reasoned, would have known that pre-existing law established that "hog-tying falls within the bounds of the Fourth Amendment's prohibition of the use of excessive force . . . ." *Id.* at 446. The Fifth Circuit reasoned that this Court, in *Tennessee v. Garner*, 471 U.S. 1 (1985), held that the use of deadly force on an arrestee who posed no threat of serious physical harm violated the Fourth Amendment. *Id.* Deadly force is that degree of force that would create a substantial risk of death or serious bodily injury. *Id.* The court found that the plaintiff demonstrated that hog-tying in these circumstances would constitute deadly force, and thus violate clearly established law. *Id.* at 446-47. The *Gutierrez* court acknowledged that a broadly disseminated study of deaths in police custody revealed a syndrome known as Sudden Custody Death Syndrome, caused by "(1) drug use, (2) positional asphyxia, (3) cocaine psychosis, and (4) hog-tying or carotid choke holds." *Id.* at 446. Finding that the officers were not entitled to qualified immunity, the *Gutierrez* court relied in part on the fact that the officers' police agency had prohibited hog-tying. *Id.* at 449. Likewise, as the Eleventh Circuit's opinion in this case explicitly observed, the police department's training officer emphasized in his deposition testimony that "it is department policy not to hogtie arrestees." App. A, 11a.

Accordingly, this Court should grant the petition to resolve this conflict between the Fifth Circuit's opinion in *Gutierrez* and the Eleventh Circuit's opinion in this case.

II THE ELEVENTH CIRCUIT'S JUDGMENT CONFLICTS WITH THIS COURT'S "FAIR WARNING" STANDARD ESTABLISHED IN *HOPE V. PELZER*, 536 U.S. 730 (2002)

This Court should also grant this petition pursuant to Sup. Ct. R. 10(c), as the Eleventh Circuit's opinion conflicts with this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002). In *Hope*, this Court reversed the Eleventh Circuit on the basis that its qualified immunity analysis required an impermissibly specific degree of factual similarity of previously decided cases before holding that the law was clearly established for qualified immunity purposes. In *Hope*, this Court concluded that the Eleventh Circuit should have found that its own precedents clearly established that reasonable prison guards would know that handcuffing convicted prisoners to a hitching post violated the Eighth Amendment. *Id.* at 747-48.

In *Hope*, the Eleventh Circuit concluded that such a technique violated the Eighth Amendment. *Id.* at 736. However, the Eleventh Circuit nonetheless found that prison guards were entitled to qualified immunity because no cases that were "preexisting, obvious and mandatory" were "materially similar" to the facts of *Hope*, and affirmed the order granting summary judgment on the guards' qualified immunity defense. *Id.* at 736.

Initially, this Court found that the facts at the summary judgment stage demonstrated that the Eighth Amendment violation is obvious. *Id.* at 738. As punishment for disobeying guards at a chain gang's

worksite, Hope was transported back to the prison, shackled in leg irons, and handcuffed to a hitching post for 7 hours with water provided only once or twice. *Id.* at 734-35. This Court found that such an "'unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" *Id.* at 737. However, this Court then found that the Eleventh Circuit's requirement of the existence of "materially similar" precedent "is not consistent with our cases." *Id.* at 739.

Instead, the *Hope* Court confirmed that officers are entitled to a "fair warning" that their conduct violates the Constitution. *Id.* at 739-40, *citing United States v. Lanier*, 520 U.S. 259 (1997). According to *Hope*, "our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741. This Court explicitly rejected the requirement that only a "fundamentally similar" or "materially similar" case can clearly establish the law. *Id.* Under *Lanier* and *Hope*, "the salient question that the Court of Appeals ought to have asked is whether the state of the law [at the time of the incident] gave respondents fair warning that their alleged treatment of Hope was unconstitutional." *Id.* As this Court reasoned, "The use of the hitching post as alleged by Hope "'unnecessar[ily] and wanton[ly] inflicted pain,' and thus was a clear violation of the Eighth Amendment. Arguably, the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Eighth Amendment." *Id.* (quotations and citations omitted).

In addition, this Court readily concluded that the Eleventh Circuit's own precedent clearly established that the prison guards' conduct violated Hope's constitutional rights. *Id.* at 742. This Court found, for instance, that the Eleventh Circuit's opinion in *Ort v. White*, 813 F. 2d 318 (11th Cir. 1987), provided fair warning to the respondent guards that their conduct was unconstitutional. The *Ort* court held that an officer's temporary denial of water, done in an effort to coerce an inmate to comply with the rules of a prison work squad, did not violate the Constitution. *Id.* at 743, *citing Ort*, 813 F. 3d at 325. However, the *Hope* Court observed that the *Ort* opinion also acknowledged that, had the officers later denied the inmate water at the prison as punishment for violating the rules, or placed the inmate's health at risk, they would have violated the Constitution. *Id.* Thus, this Court reasoned, the premise of *Ort* - that the Eighth Amendment is violated by physical abuse of an inmate after he terminates his resistence to authority - but not necessarily the facts of *Ort*, provided fair warning to the guards in *Hope* that their conduct was unconstitutional. *Id.*

As the Eleventh Circuit failed to apply the "fair warning" standard in *Hope*, so too did the Eleventh Circuit require more than "fair warning" in this case. The district court held that, because Lewis "was already handcuffed and effectively immobilized," App. C, 29a, there was no need for officers "to kneel on Lewis' upper back and neck" and no need for an officer "to pick up and shove Lewis' legs down toward his awkwardly contorted body." App. C, 29a. These actions violated the Fourth Amendment, the district

court held, because they did nothing to achieve the officers' ostensible goals of restraining Lewis or placing him in a seated position. *Id.*

As in *Hope*, the Eleventh Circuit overlooked its ample precedent, in the context of Fourth Amendment excessive force cases, that established the principle that force is unconstitutional when it is unnecessarily applied after an arrestee is secured in handcuffs. Such force is even less justifiable in this case, as Lewis was civilly detained as a "Signal 20," or mentally disturbed person, and not arrested as a criminal, and because the force used was especially severe. Again, according to Dr. Baden, Lewis died of a neck compression that created large areas of hemorrhage around his neck and in his eyes.

Lewis relied on a line of Eleventh Circuit cases that denied qualified immunity in cases involving the unnecessary application of force during Fourth Amendment seizures. In *Lee v. Ferraro*, 284 F. 3d 1188 (11th Cir. 2002), the court denied qualified immunity to an officer who slammed an arrestee's head against the hood of her car "*after* she was arrested and secured in handcuffs." *Id.* at 1198 (emphasis in original). In *Mercado v. City of Orlando*, 407 F. 3d 1152 (11th Cir. 2005), the court denied qualified immunity to an officer who used force, indeed deadly force, against a non-resisting, non-threatening mentally ill person because it was unnecessary to any legitimate law enforcement purpose. *Id.* at 1157, 1160. *See also Smith v. Mattox*, 127 F. 3d 1416, 1419-20 (11th Cir. 1997)(denying qualified immunity to officer who broke arrestee's arm with a blow while handcuffing him); *Hadley v.*

Gutierrez, 526 F. 3d 1324, 1330 (11th Cir. 2008)(in context of a 2002 seizure, denying qualified immunity to an officer who gratuitously used force on a handcuffed, non-resisting prisoner); *Reese v. Herbert*, 527 F.3d 1253, 1274 (11th Cir. 2008)(same holding in context of 2003 seizure).

In summary, the Eleventh Circuit's opinion in this case conflicts with the holding of *Hope*, as the Eleventh Circuit's own precedents provided fair warning to the respondent officers in this case that the severe force used in civilly detaining Donald Lewis was, as the district court found, unnecessary and gratuitous.

III. THE ELEVENTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE DECISION OF THE TENTH CIRCUIT REGARDING MUNICIPAL LIABILITY FOR THE FAILURE TO TRAIN OFFICERS ON THE SAFE APPLICATION OF ANKLE HOBBLES

This Court should grant the petition pursuant to Sup. Ct. R. 10(a), as the Eleventh Circuit has entered a decision in conflict with a decision of the Tenth Circuit on the same important matter. In this case, the Eleventh Circuit concluded both that the respondents' use of the hobble restraint did not violate the Fourth Amendment, and assuming it did, the City of West Palm Beach would not be liable for the failure to train its officers on the safe application of the device.

These holdings conflict with the opinion by the Court of Appeals for the Tenth Circuit in *Cruz v. City of Laramie*, 239 F. 3d 1182 (10th Cir. 2001). First, the

Cruz court held that, given the known dangers posed by this restraint, the use of hog-tie on an arrestee with "diminished capacity" constitutes constitutionally excessive force. *Id.* at 1188-89. *Cruz* also applied the failure-to-train principle of municipal liability established in *City of Canton v. Harris*, 489 U.S. 378 (1989) to the use of ankle hobbles to hog-tie arrestees. The *Cruz* Court relied on the fact that the district court

> cited evidence that the City failed to train it's officers on the use of hobble restraints and that the City put such restraints in its police cars. The Court also noted that high ranking officials were aware of positional asphyxia attributable to hobble restraints and of a doctor's report stating that "deaths in police custody with hog-tie restraints have been reported in medical literature a number of times."

Id. at 1191, *quoting* district court.

Accordingly, this Court should grant the petition to resolve the conflict between the Eleventh and Tenth Circuits on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons stated above.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12348

[Filed March 11, 2009]

D.C. Docket No. 06-81139-CV-DTKH

LINDA LEWIS, as mother and personal representative of the estate of her son, Donald George Lewis, deceased,

Plaintiff-Appellant,

versus

CITY OF WEST PALM BEACH, FLORIDA, RAYMOND SHAW, ROBERT LEROY ROOT, III, RANDALL MAALE, THELTON LUKE, AUDREY DUNN, Police Officers for the City of West Palm Beach Police Department, in their individual capacities,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(March 11, 2009)

Before DUBINA and CARNES, Circuit Judges, and GOLDBERG,* Judge.

GOLDBERG, Judge:

While in the custody of five police officers in West Palm Beach, Florida, Donald George Lewis became unconscious, and eventually died. Following the death of her son, Linda Lewis filed an action against the City of West Palm Beach and the individual police officers Raymond Shaw, Robert Leroy Root III, Randall Maale, Thelton Luke, and Audrey Dunn pursuant to 42 U.S.C. § 1983 and Florida state law. Thedistrict court granted summary judgment in favor of the City of West Palm Beach and the individual officers. Ms. Lewis appealed this order. For reasons discussed below, we affirm the decision of the district court.

Background

On October 19, 2005, Officer Raymond Shaw encountered Donald George Lewis near the intersection of 45th Street and Broadway in West Palm Beach, Florida. Lewis was disoriented, stumbling into the road, and trying to flag down passing vehicles. Officer Shaw attempted to stop Lewis, who was breathing heavily, grunting incoherently, and appeared to be under the influence of some type of narcotic. Shaw instructed Lewis to sit down on the side of the road. Lewis complied, but seconds later he stood

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* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

and ran into traffic. Shaw struggled with Lewis and maneuvered him to the ground. He then attempted to handcuff Lewis's hands behind his back. Officer Robert Root appeared on the scene. In an effort to assist Shaw in the handcuffing process, Officer Root placed his knee on Lewis's upper back and neck. Officer Thelton Luke also arrived on the scene. Officers Luke and Root then bound Lewis's legs using a leg restraint. Throughout, Lewis continued groaning and breathing heavily and did not respond to Shaw's repeated requests to calm down. The three officers carried Lewis to the side of the road. They attempted to place him in a seated position, but Lewis would not sit up. Officers Randall Maale and Audrey Dunn arrived. Officer Maale suggested Root further restrain Lewis by attaching the ankle restraint to the handcuffs with a hobble cord[1] (also known as "TARP," the total appendage restraint position). In an attempt to attach the hobble, Luke and Root kept their knees on Lewis's back, while Shaw picked up Lewis's bound legs and pushed them forward. The hobble was tightened so that Lewis's hands and feet were close together behind his back in a "hogtied" position.[2] After Lewis's hands and feet were bound together, Maale realized that Lewis had become unconscious. The officers removed the hobble and restraints and began CPR. Paramedics arrived within minutes, but were unable to resuscitate Lewis. He was later pronounced dead.

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[1]A hobble cord is a strap with a loop on one end and a metal hook at the other that is used to limit movement by connecting the ankle restraint to the handcuffs.

[2]Also referred to as fettering, the hogtie position is one where the hands and feet are strapped relatively closely together behind the back, rendering the subject immobile.

The exact cause of death is unclear. At the district court level, the defendants relied on the testimony of Dr. Michael Bell, the county medical examiner who performed the autopsy of Lewis. Dr. Bell concluded that the cause of death was "sudden respiratory arrest following physical struggling restraint due to cocaine-induced excited delirium." Ms. Lewis offered the expert testimony of Dr. Michael Baden, who testified that the cause of death was asphyxia caused by neck compression.[3]

Standard of Review

A district court's grant of summary judgment is reviewed *de novo*. *Kingsland v. City of Miami*, 382 F.3d 1220, 1225 (11th Cir. 2004). In evaluating the claims, the evidence and factual inferences are viewed in a light most favorable to the nonmoving party. *Id.* at 1226.

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[3] The entire incident was captured on videotape, which was submitted as evidence to the district court, and is part of the record on appeal. We have followed the Supreme Court's example and reviewed *de novo* the videotape evidence that was presented to the district court at the summary judgment stage. *See Scott v. Harris*, 550 U.S. 372, ___, 127 S. Ct. 1769, 1776 (2007) ("Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have reviewed the facts in the light depicted by the videotape.").

Discussion

I. Qualified Immunity for the Police Officers

Appellant claims that Officers Shaw, Root, and Luke in restraining Lewis used excessive force in violation of the Fourth Amendment. Appellant argues that Officers Maale and Dunn had a duty to intervene when witnessing the use of excessive force, and they failed to do so. She asserts that pursuant to 42 U.S.C. § 1983 the officers are liable for constitutional violations in their individual capacities. The officers dispute these assertions and claim exemption from civil liability under the doctrine of qualified immunity.

Qualified immunity protects municipal officers from liability in § 1983 actions as long "as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To receive qualified immunity, the officer must first show that he acted within his discretionary authority. *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002). It is undisputed in this case that the officers were acting within their discretionary authority.

Once discretionary authority is established, the burden then shifts to the plaintiff to show that qualified immunity should not apply. *Id.* In analyzing the applicability of qualified immunity, the Court has at its disposal a two-step process. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Traditionally, a court first determines whether the officer's conduct amounted to a constitutional violation. *Id.* Second, the court analyzes whether the right violated was "clearly

established" at the time of the violation. *Id.* The intention is to "ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Id.* at 206. Thus, if the violated right was not clearly established, qualified immunity still applies. *Id.* at 201. The Supreme Court recently clarified the *Saucier* two-step process explaining that the order of the inquiry is fluid, providing the Court with the flexibility to focus on the determinative question. *Pearson v. Callahan*, U.S. 2009, 555 U.S. ___ (No. 07-751, Jan. 21, 2009). The Supreme Court recognized that discussion of a constitutional violation may become unnecessary for qualified immunity purposes when the right was not clearly established. *Id.* It is therefore not mandated that the Court examine the potential constitutional violation under *Saucier* step one prior to analyzing whether the right was clearly established under step two. *Id.*

Such analytical flexibility is certainly applicable here. Even if the officers' actions violated Lewis's Fourth Amendment rights, the appellant did not demonstrate that the officers' conduct was an intrusion on a clearly established right. A right may be clearly established for qualified immunity purposes in one of three ways: (1) case law with indistinguishable facts clearly establishing the constitutional right, *Long v. Slaton*, 508 F.3d 576, 584 (11th Cir. 2007); (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right, *id.*; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law. *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005).

Here, case law does not provide the necessary precedent, either specifically or through broad principles, to clearly establish the right. Thus, only if the officers' conduct was so egregious and unacceptable so as to have blatantly violated the Constitution would qualified immunity be unavailable to them. However, to come within this narrow exclusion, "plaintiff must show that the official's conduct was so far beyond the hazy border between excessive and acceptable force that the official had to know he was violating the Constitution even without case law on point." *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997). This standard is met when every reasonable officer would conclude that the excessive force used was plainly unlawful. *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 926-27 (11th Cir. 2000). Appellant argues that because the officers further restrained Lewis with the hobble after the need for any use of force had passed and tightened it to form a hogtie, the officers' conduct rose to this level of egregiousness. This is not the case. Even though most of the officers in this case testified that Lewis was not a danger to them and was merely resisting arrest, he was, as the district court described, "an agitated and uncooperative man with only a tenuous grasp on reality." Because of his refusal to sit upright and his inability to remain calm, Lewis remained a safety risk to himself and to others.

As the district court observed, this was precisely the type of situation where the decisions of the officers confronted with "circumstances that are tense, uncertain, and rapidly evolving" should not be second-guessed. *See Graham v. Connor*, 490 U.S. 386, 397 (1989). Unlike many of the cases cited by plaintiff, Lewis did not remain compliantly restrained. *Cf. Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002) (qualified

immunity denied to officer who was physically rough with arrestee despite any sort of threat or physical aggression on her part); *Priester v. City of Riviera Beach*, 208 F.3d 919 (11th Cir. 2000) (qualified immunity denied to officer who ordered a dog attack on a passive suspect); *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997) (qualified immunity denied on summary judgment to officer who broke arrestee's arm after he was passively under arrest). Even though he was not forcefully attacking the officers, Lewis continued to struggle. The application of the hobble may not have been entirely necessary; however, the officers' attempts to restrain Lewis were not so violent and harsh to be considered an egregious violation of a constitutional right, and they are not an obstacle to the application of qualified immunity. Despite the unfortunate result that night, qualified immunity insulates the officers from liability for Lewis's death.

II. Municipal Liability for the City of West Palm Beach

In addition to the liability pegged on the police officers, Appellant also claims that the City of West Palm Beach is responsible for Lewis's death pursuant to 42 U.S.C. § 1983 because of a failure to provide adequate training to its police officers on the use and application of hobbles. Appellant contends that the pressure applied to Lewis's upper back and neck by Officer Luke and then Officer Shaw, along with the use of the hobble as a hogtie caused Lewis's sudden death, and that these actions can be attributed to City policy.

A city may only be held liable under 42 U.S.C. § 1983 when the injury caused was a result of

municipal policy or custom. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Municipal policy or custom may include a failure to provide adequate training if the deficiency "evidences a deliberate indifference to the rights of its inhabitants." *Id.* at 388. To establish a city's deliberate indifference, "a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998). A city may be put on notice in two ways. First, if the city is aware that a pattern of constitutional violations exists, and nevertheless fails to provide adequate training, it is considered to be deliberately indifferent. *Id.* at 1351. Alternatively, deliberate indifference may be proven without evidence of prior incidents, if the likelihood for constitutional violation is so high that the need for training would be obvious. *Id.* at 1351-52.

Appellant's argument rests on the latter premise. Appellant claims that the need for training on the proper use of hobble restraints and the proper placement of weight on an arrestee's back during the restraint process is "so obvious" that it requires proactive training by the City to ensure avoidance of constitutional violations. In establishing this form of notice, the Supreme Court referenced the proper use of firearms and the correct use of deadly force as an area that would be so obvious as to require adequate training by the municipality to avoid liability. *City of Canton*, 489 U.S. at 390 n. 10. In comparison, this Court refused to acknowledge the proper response to handcuff complaints as so obvious as to put the municipality on notice that training is required. *Gold*, 151 F.3d at 1352. Similarly, the application of a hobble

does not rise to the level of obviousness reserved for "a narrow range of circumstances [where] a violation of federal rights may be a highly predictable consequence" of a failure to provide adequate training. *Bd. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 409 (1997). Despite the questionable use of the hobble in this particular situation, hobbles do not have the same potential flagrant risk of constitutional violations as the use of deadly firearms. Failure to provide training on hobbles is not a "particular glaring omission in a training regimen." *Id.* at 410. Notably, in both the case at bar and as previously decided in *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1280 (11th Cir. 2004), hogtying or "fettering" under the given circumstances does not violate the Fourth Amendment. The City is therefore unlikely to be on notice of its potential legal ramifications in this context. Thus, the hobble, and the understanding of its proper application, does not carry a high probability for constitutional violations in the manner intended by the "so obvious" notice that would open the door to municipal liability.

Additionally, the City of West Palm Beach does provide training on the use of the hobble. In resolving the issue of the City's liability, "the focus must be on the adequacy of the training programs in relation to the tasks the particular officers must perform," and not merely on the training deficiencies for a particular officer. Canton, 489 U.S. at 390. It is thus irrelevant what training each specific officer present at the scene was given or retained. Training Officer Gerald MacCauley testified that the City of West Palm Beach provides regular training on the use of force, and additionally provides specific training on the use of hobbles. The officers are also told that the proper

placement of pressure or weight placed on an individual while restraining them should be on the back, near the shoulder blades, and not on the neck area. Officer MacCauley further emphasized that it is department policy not to hogtie arrestees; however it is acceptable to bring the ankles near the wrists briefly, if necessary, while attaching the hobble. While not under a specific constitutional duty under § 1983, the City takes actions to ensure that arrestees are not subjected to unnecessary or painful procedures when restrained.

Because the City of West Palm Beach did not maintain a deliberate indifference to a potentially obvious constitutional violation and because the City provides some training on the use of hobbles, the City cannot be held liable under 42 U.S.C. § 1983.

III. Wrongful Death Claim Against the City

The district court found that Appellant failed to state a claim of wrongful death because she alleged that the officers' use of force was negligent, and there is no cause of action for the negligent use of force. The district court is correct on this count; it is inapposite to allege the negligent commission of an intentional tort, such as the use of excessive force. *See City of Miami v. Ross*, 695 So.2d 486, 487 (Fla. 3d DCA 1997); *City of Miami v. Sanders*, 672 So.2d 46, 48 (Fla. 3d DCA 1996). This claim fails.

Conclusion

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of the

individual police officers named in this case, and the City of West Palm Beach.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-81139-CIV-HURLEY/HOPKINS

[Filed April 28, 2008]

LINDA LEWIS,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF WEST PALM BEACH, et al.,	)
	)
Defendants.	)
	)

ORDER DENYING PLAINTIFF'S MOTION TO ALTER JUDGMENT

THIS CAUSE is before the court upon plaintiff's motion to alter judgment pursuant to Fed. R. Civ. P. 59(e) [DE # 192]. On March 18, 2008, the court granted defendants' motions for summary judgment and denied plaintiff's motion for summary judgment. *See* DE # 190. On April 2, 2008, plaintiff filed the instant Rule 59(e) motion asking the court to vacate its judgment in favor of defendants.

The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact. *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). Plaintiff has not presented any newly-discovered evidence; nor, after reviewing plaintiff's motion and the related briefs, is the court persuaded that its earlier order is based on a manifest error of law or fact. Plaintiff cites several cases in an effort to show that the constitutional rights allegedly violated by defendants Shaw, Root and Luke were "clearly established," and that qualified immunity is thus unavailable to those defendants.

However, the various cases cited by plaintiff all involve substantially dissimilar facts, and are thus incapable of overcoming the qualified immunity defense. *Mercado v. City of Orlando*, 407 F.3d 1152 (2005), was noted, discussed and distinguished in the court's order granting defendants' motions for summary judgment. *See* DE # 190 at 13-14. *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002), *Thorton v. City of Macon*, 132 F.3d 1395 (11th Cir. 1998) and *Sheth v. Webster*, 145 F.3d 1231 (11th Cir. 1998) all involved a much greater disparity between the level of force used and the need for force than was present in this case. *Slicker v. Jackson*, 215 F.3d 1225 (11th Cir. 2000) involved allegations that a police officer had both slammed a handcuffed man's head into the ground and repeatedly kicked the man; *Priester v. City of Riviera Beach*, 208 F.3d 919 (11th Cir. 2000) involved an attack by a police dog; and *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997) concerned the application of excessive force against an arrestee who, unlike Mr. Lewis, "docilely submitted to arrest." *Id.* at 1418. The cases cited by plaintiff were thus insufficient to put defendants on notice that their alleged behavior in this

case violated Mr. Lewis' constitutional rights, and the court will adhere to its judgment.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Plaintiff's motion to alter judgment [DE # 192] is **DENIED**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida, this 28th day of April, 2008.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States District Judge

Copies provided to counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-81139-CIV-HURLEY/HOPKINS

[Filed March 19, 2008]

LINDA LEWIS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CITY OF WEST PALM BEACH, et al.,	)
	)
Defendants.	)
	)

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE is before the court upon plaintiff's motion for summary judgment [DE # 97] and defendants' motions for summary judgment [DE # 91, 94, 95, 96, 98]. For the reasons expressed below, the court will deny plaintiff's motion and grant defendants' motions.

BACKGROUND

This is a Section 1983 and wrongful-death action against the City of West Palm Beach and five of its police officers. The facts given below are drawn from the pleadings and record evidence and, in the resolution of each motion, have been viewed in the light most favorable to the non-moving party. *See Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1363 (11th Cir. 2007).

At around 1:19 a.m. on October 19, 2005, concerned bypassers calling 911 reported a man in need of assistance near the intersection of 45th Street and Broadway in West Palm Beach. Defendant Officer Raymond Shaw arrived at the scene to find Donald George Lewis shirtless and apparently distraught, stumbling onto the road and attemping to flag down passing vehicles. Lewis had been using cocaine earlier in the night. Officer Shaw exited his squad car and confronted Lewis. Officer Shaw asked Lewis "what's up, buddy?" and directed Lewis to lie down on the side of the road. Lewis, breathing heavily and grunting incoherently, did so. Officer Shaw asked Lewis "how much coke did you smoke, man?" to which Lewis replied "I didn't do nothing."

Officer Shaw asked Lewis to relax, but Lewis did not. Lewis continued to gesticulate wildly and thrash about on the shoulder of 45th Street. Lewis intermittently obeyed Officer Shaw's direction to stay down on the side of the road but did not remain there. Eventually Lewis stood and ran, arms raised and yelling unintelligibly, across 45th Street. Vehicles in the westbound lane of 45th Street were forced to stop in order to avoid hitting Lewis. Officer Shaw caught up

to Lewis in the westbound lane and first attempted to pull Lewis off the road, then forced him to the ground in the center of the road. Lewis resisted Officer Shaw's attempts to subdue him and ignored Officer Shaw's request that he put his hands behind his back. After a struggle, Officer Shaw was able to manuever Lewis into a prone position. With his knee on Lewis' lower back, Officer Shaw brought Lewis' hands behind his back and began to handcuff them.

As Officer Shaw was doing so, defendant Officer Robert Leroy Root, III arrived on the scene. Officer Root placed his knee on Lewis' upper back and neck, between Lewis' shoulder blades. Lewis continued to groan and grunt audibly, while Officer Shaw and Officer Root pleaded with Lewis to calm down. Approximately one minute after he began assisting Officer Shaw, Officer Root arose and returned to his squad car to obtain a leg restraint. While Officer Shaw continued to hold Lewis down in a prone position, defendant Officer Thelton Luke arrived, and together Officer Luke and Officer Root bound Lewis' legs using the leg restraint. After application of the leg restraint, Officer Shaw stood up. Lewis continued breathing heavily and groaning. Officer Shaw suggested that they remove Lewis from the road, and the three officers picked up Lewis by his arms and legs. Lewis apparently attempted to bite Officer Shaw in the shins as Officer Shaw helped carry Lewis out of the road.

The officers placed Lewis on the sidewalk just outside of the road and attempted to put Lewis into a seated position, but Lewis refused to sit up and continued to writhe on the ground. At this point, defendants Officer Maale and Officer Dunn arrived at the scene, and Officer Shaw briefly placed his knee

once again on Lewis' upper back, although less forcefully. The five officers all stood for a moment, considering what to do. Then, while Officer Luke and Officer Root kept their knees on Lewis' back, Officer Shaw picked up Lewis' bound legs and pushed them down and forward. Lewis suddenly became silent and motionless. The officers then tied Lewis' hands and feet together behind his back in a "hogtied" position.

Officer Maale realized that Lewis had become unconscious and ordered the other officers to move Lewis onto his side. Officer Root reported that Lewis had a pulse, although Lewis remained non-responsive. The officers gave first aid to Lewis, including CPR, while waiting for medical assistance to arrive. The officers continued to observe that Lewis maintained a pulse, but was not breathing. Paramedics arrived within several minutes and assumed control of Lewis' treatment, but they were unable to resuscitate Lewis. Lewis was later pronounced dead.

On December 11, 2006, plaintiff Linda Lewis, Donald Lewis' mother, filed this lawsuit. The suit named as defendants the City of West Palm Beach; the five individual police officers involved in the incident; Langley Productions; and Danny Jeffrey and Zach Ragsdale, two Langley employees.[1] On October 15,

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[1] Langley Productions produces the television show "COPS." A camera crew from the show was assigned to follow Officer Shaw on the night of October 19th, 2005, and created a video recording of the entire incident. Although initially named as defendants, Langley Productions, Danny Jeffrey and Zach Ragsdale were dropped from the lawsuit on November 29, 2007. *See* DE # 163. Both parties nonetheless rely heavily on the video recording to establish the facts underlying their motions, and agree that the

2007, plaintiff, the City of West Palm Beach, and the individual officers all filed the six instant motions for summary judgment [DE # 91, 94, 95, 96, 97, 98].

JURISDICTION

This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the amended complaint [DE # 22] asserts a claim under 42 U.S.C. § 1983. This court has supplemental jurisdiction over plaintiff's state-law claim pursuant to 28 U.S.C. § 1367(a).

Venue is proper in this district pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving rise to plaintiff's claims occurred in the Southern District of Florida.

DISCUSSION

A. Standard of Review on Motion for Summary Judgment

Summary judgment is warranted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Cattrett*, 477 U.S. 317, 322 (1986). The moving party bears the burden of meeting this exacting standard. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In

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recording is a reliable and accurate representation of the disputed events.

determining whether summary judgment is appropriate, the facts and inferences from the record are viewed in the light most favorable to the non-moving party, and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Matsuhita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

The non-moving party, however, bears the burden of coming forward with evidence of each essential element of his claims, such that a reasonable jury could return a verdict in his favor. *See Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1243 (11th Cir. 2002). In response to a properly supported motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The existence of a mere scintilla of evidence in support of the non-movant's position is insufficient; there must be evidence on the basis of which a jury could reasonably find for the non-movant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). A complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial and entitles the moving party to summary judgment. *See Celotex*, 477 U.S. at 323; *Gonzalez v. Lee County Housing Authority*, 161 F.3d 1290, 1294 (11th Cir. 1998).

B. Motions for Summary Judgment[2]

1. Constitutional Claims

Plaintiff's § 1983 claim against the City of West Palm Beach proceeds on the "failure to train" theory authorized by the Supreme Court in *City of Canton v. Harris*, 489 U.S. 378 (1989). Plaintiff's § 1983 claims against the individual officers must overcome the officers' defenses of qualified immunity. *See Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). The threshold question in both cases is whether Lewis' constitutional rights were violated. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (requiring courts to address the constitutional issue before the question of qualified immunity).[3] Thus, the court must first decide whether the police officers violated Lewis' Fourth Amendment rights.

a. Fourth Amendment

The Fourth Amendment provides citizens with the right to be free from the use of excessive force in the course of a lawful seizure. *See Draper v. Reynolds*, 369 F.3d 1270, 1277 (11th Cir. 2004). Force is not excessive if the officer's actions, judged from the perspective of

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[2] Plaintiff moves for summary judgment only as to Count III, the § 1983 claim against the officers in their individual capacities. Defendants' motions for summary judgment address all counts.

[3] The Supreme Court recently expressed doubts about *Saucier*'s "order of battle" rule, but simultaneously recognized its continued vitality. *See Scott v. Harris*, 127 S.Ct. 1769, 1774 n.4 (2007); *id.* at 1780 (Breyer, J., concurring) (suggesting that the Court "can and should reconsider *Saucier*'s requirement").

a reasonable officer on the scene, were objectively reasonable in light of the facts and circumstances. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989); *Beshers v. Harrison*, 495 F.3d 1260, 1266 (11th Cir. 2007); *Lee v. Ferraro*, 284 F.3d 1188, 1197 (11th Cir. 2002). The question of whether force is unreasonable, and therefore excessive, is a question of fact. *See, e.g. Slicker v. Jackson*, 215 F.3d 1225, 1233 (11th Cir. 2000). To determine the existence of genuine issues of material fact on the reasonableness of force, courts must examine the need for the application of force, the relationship between the need and amount of force used, and the extent of the injury inflicted. *Draper*, 369 F.3d at 1277-78.

Review of the videotape and other record evidence in this case reveals no genuine issue of material fact concerning whether, for most of the incident, the officers applied reasonable force. When Officer Shaw first arrived on the scene, Lewis was shirtless, hyperventilating and non-responsive to Officer Shaw's inquiries. Lewis was ranting and raving, panicked and inconsolable. Officer Shaw correctly perceived that Lewis was under the influence of cocaine, and was either unwilling or unable to comply with Officer Shaw's instructions or coherently answer Officer Shaw's questions. Lewis then ran into the path of oncoming traffic in the westbound lane of 45th Street. A reasonable officer in Officer Shaw's position clearly would have been concerned that Lewis posed a danger both to himself and to others nearby. Under these circumstances, it was reasonable for Officer Shaw to confront and attempt to restrain Lewis.

The video recording shows that when Officer Shaw caught up to Lewis, he first attempted to pull Lewis

out of the street. When Officer Shaw made physical contact with Lewis, Lewis began to resist. Officer Shaw plainly acted reasonably in attempting to restrain Lewis, who was struggling and groaning bizarrely. The force used by Officers Shaw, Root and Luke in forcibly removing Lewis from the street was clearly reasonable, considering the dangers posed by possible traffic to Lewis, the officers, and passing motorists. Finally, the officers' application of a hobble to Lewis by the side of the road was also reasonable. Byand large, the video shows that the officers were attempting to secure and restrain a man who was clearly intoxicated, in a dangerous state of panic and behaving extremely erratically. Since Officer Shaw initially confronted him, Lewis had consistently demonstrated that he would not respond to officers' queries or instructions, or to control his behavior in any reasonable way. The use of force by the officers was generally objectively reasonable under all the circumstances.

However, two specific aspects of the incident give rise to a genuine issue of material fact as to whether three of the officers named as defendants used excessive force. The first is the officers' repeated placement of their knees on Lewis' upper back or neck while Lewis was lying prone. This technique was first employed by Officer Root while assisting Officer Shaw in handcuffing Lewis near the centerline of 45th Street. While the use of the technique may have been necessary in order to immobilize Lewis while he was being handcuffed by Officer Shaw, it served no purpose after Lewis was handcuffed. Yet Officer Root continued to forcefully depress his knee on the back of Lewis' neck for nearly one additional minute. During this time, Lewis squirmed and groaned as though in pain.

Once Lewis had been removed from the street, Officer Shaw placed his own knee on Lewis' upper back, although in this instance Lewis was turned partially to the side. Finally, while the officers bound Lewis in the hobbling device, Officer Root and Officer Luke appeared to both have their knees on Lewis' back. Here again, because Lewis' hands were cuffed behind his back and his feet already tied together, there appears to have been no reason for Officer Root and Officer Luke to employ such a painful and potentially dangerous technique. A reasonable juror, considering the particular way Officer Shaw, Officer Root and Officer Luke used this technique in this incident, could conclude that it constituted an excessive use of force under the circumstances.

Second, Officer Shaw took one particularly dangerous and unnecessary action by the side of the road. At one particular point while Lewis was handcuffed and lying face-down, Officer Root and Officer Luke had their knees on Lewis' back. While attempting to apply the hobble to Lewis' legs, Officer Shaw picked up Lewis' legs in an obviously unnatural and dangerous position and violently shoved them forward, placing tremendous stress on Lewis' spine and neck.[4] At just that moment, Lewis, who had been continuously groaning and writhing, suddenly became silent and motionless.

Whether the officers' treatment of Lewis could have caused Lewis' death is a matter of dispute between the parties. Defendants rely on the report of Dr. Michael

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[4] This occurs approximately six minutes and forty seconds into the video recording.

Bell, the chief medical examiner for Palm Beach County. Dr. Bell concluded that the cause of Lewis' death was "sudden respiratory arrest following physical struggling restraint due to cocaine-induced excited delirium." Bell Dep. at 7. But Dr. Bell's explanation of that medical concept was not terribly satisfactory. Dr. Bell described it as occurring most commonly where an individual who has been using cocaine and who has been restrained suddenly

> stop[s] fighting. Then you think everything is fine and then you realize they're not breathing or they're unresponsive. Then you do CPR and try to bring them back to life. . . . [If] they get to the hospital and resuscitation is prompt, they may survive or not . . . So again, it's like I said, a poorly understood phenomena . . . . So there's still a lot more to learn about this, especially with regard to why do they die. Why do they suddenly stop breathing?

Id. at 9-10. This does not shed a tremendous amount of light on what caused Lewis' death. The general thrust of Dr. Bell's opinion seems to be that the combination of Lewis' cocaine use and his restraint by the police officers somehow caused Lewis to stop breathing. Dr. Bell further testified that

> it's unclear to me to what degree the struggle and the, you know, the cocaine or whatever is going on in their mind, which has a greater affect [sic]. Clearly, I think you probably, at least most of the cases I see, you need both. There's usually a struggle, and you got this person who is – you know, it's not just a cocaine user, but there's something that happened to

them after they use cocaine that sets them apart from the other cocaine users that don't develop this syndrome . . . .

You know, this isn't the only time it's ever happened. It happened before and it will happen again. It's not going to matter whether the police restrain them or what type of restraint device or mechanism – Idon't know what the term is – that they use. It doesn't matter if they use tasers or they come up with a new device.

There's something about the struggle, you know, whether that – that interacts and maybe just puts them over the edge to, you know, go into – at least in this case it appeared to be a respiratory arrest. But it could be a cardiac arrest or a cardiopulmonary arrest. Who the hell knows unless you got them all hooked up to the machines when this is all happening.

Id. at 11-13. Finally, when asked directly if the restraint alone could have caused Lewis' death, Dr. Bell testified:

Well, if Ithought the death was as a result of him being restrained, that's what I would have called it. The way I phrased it is, again, I think probably it shows that I can't completely rule it out, but at the same time that's what was happening at the time, you know, that he became unresponsive.

So it's being honest in the sense that this is happening. He's being restrained and he suddenly becomes limp and unresponsive. I'm not sure that just restraining him was the cause of his death. If I did, I would have said that he

> died of either traumatic asphyxiation or suffocation or something like that. I think it's a lot more complex than that, and I think it starts with his excited delirium.

Id. at 14. The testimony of plaintiff's expert witness, Dr. Michael Baden, was also somewhat equivocal. Dr. Baden expressed skepticism about defendants' theory that Lewis' death was caused by "excited delirium." Dr. Baden testified that

> so-called excited delirium, sudden death due to cocaine is extremely rare and is used as an excuse often when people die during police restraint . . . . [I]n my experience in looking at excited delirium cases . . . invariably, the person would have died without the excited delirium. It's the physical forces that are involved that casue the death. And I just think that, in this case, that he did not die from excited delirium and that if he hadn't been restrained . . . he wouldn't have died.

Baden Dep. at 104. Dr. Baden testified that the cause of death was asphyxia caused by neck compression. *Id.* at 121. He also testified that the "critical" factor leading to Lewis' death was injury to Lewis' neck. *Id.* at 134-35. But Dr. Baden could not identify any of the officers' actions in particular that might have led to Lewis' death. *Id.* Dr. Baden also acknowledged that he could not tell from the evidence before him precisely when Lewis stopped breathing, or by what mechanism the officers' actions might have caused Lewis to stop breathing. *Id.* at 88-90.

Given the conflicting nature of the record evidence, particularly the testimony of the two experts, both the cause of Lewis' death and the role of the officers in it, if any, remains unclear. But in any event, regardless of whether the actions of the officers caused Lewis' death, a reasonable juror could find that the officers used constitutionally excessive force under the circumstances. After Lewis was already handcuffed and effectively immobilized, there was simply no need for the officers to kneel on Lewis' upper back and neck. Nor was there a need for Officer Shaw to pick up and shove Lewis' legs down toward his awkwardly contorted body. The officers were attempting to either further restrain Lewis, or to place him in a seated position. Officer Shaw's actions, combined with Officer Root's and Officer Luke's knees on Lewis' back, did not help achieve either of these possible goals. Therefore, there is a genuine issue of material fact as to whether Officer Shaw, Officer Root, and Officer Luke violated Lewis' rights under the Fourth Amendment.

b. Qualified Immunity

The doctrine of qualified immunity "offers complete protection for government officials sued in their individual capacities if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Al-Amin v. Smith*, 511 F.3d 1317, 1324 (11th Cir. 2008) (internal quotations and citations omitted). The government official claiming the protection of qualified immunity must first establish that he was acting within his discretionary authority. *Id.* There is no dispute that all five officers in this case were acting within their discretionary authority.

The burden then shifts to the plaintiff, who must satisfy a two-part test in order to avoid the application of qualified immunity. First, the plaintiff must show that the allegations, if true, establish a constitutional violation. *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). As noted *supra*, a reasonable juror could conclude that Officers Shaw, Root, and Luke used excessive force, and that Lewis' Fourth Amendment rights were thus violated. Therefore, this first part of the test has been satisfied.

Second, the plaintiff must show that the constitutional right was clearly established at the time of the alleged violation. *Al-Amin*, 511 F.3d at 1324-25. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). The requirement that the constitutional right be "clearly established" has also been described as ensuring that the officers had "fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

Under the Eleventh Circuit's framework for applying this step of the qualified immunity analysis, a plaintiff must show that the allegedly violated right was "clearly established" in one of three ways. First, the plaintiff may show that a case with indistinguishable material facts has been decided in the Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the pertinent state, affirming the existence of the right and "clearly establishing" it for purposes of qualified immunity. *Long v. Slaton*, 508 F.3d 576, 584 (11th Cir. 2007). Second, a broad

statement of principle in case law can be sufficient under some circumstances to "clearly establish" conduct as unconstitutional. *Williams v. Consolidated City of Jacksonville*, 381 F.3d 1298, 1303 (11th Cir. 2004); *Marsh v. Butler County*, 268 F.3d 1014, 1032 n.9 (11th Cir. 2001) (en banc). Third, the plaintiff may show that the alleged conduct of the officials was so egregious that the rights violated were clearly established, even in the total absence of case law. *Vinyard*, 311 F.3d at 1350.

Plaintiff conceded at oral argument that there are no relevant cases with materially indistinguishable facts (or, for that matter, with facts even vaguely similar to the case at bar) holding that an officer's knee on a detainee's back, or the use of a hobble restraint, constitutes excessive force. The court's own research has likewise revealed none. Thus, plaintiff is unable to overcome the officers' qualified immunity defense with the first method described above.

Plaintiff argues that the Eleventh Circuit's cases demonstrate a "broad principle" governing the limits of the use of non-lethal force, and that the principle is sufficient to clearly establish the constitutional rights allegedly violated by the officers. In particular, plaintiff likens this case to *Mercado v. City of Orlando*, 407 F.3d 1152 (11th Cir. 2005), in which the Eleventh Circuit reversed a grant of summary judgment in favor of police officers whose use of so-called "less-lethal" force was alleged to have been excessive.

In *Mercado*, police officers were confronted with a distraught man holding a knife toward his own chest, threatening to kill himself. One of the police officers in that case fired a supposedly non-lethal projectile at the

man from nearly point-blank range. The projectile hit the man in the head and killed him. The Eleventh Circuit reversed the grant of summary judgment in favorof the officer who fired the projectile.

The *Mercado* court emphasized that the victim "was not committing a crime, resisting arrest, or posing an immediate threat to the officers at the time he was shot." 407 F.3d at 1157-58. The confrontation in *Mercado* also apparently took place in the victim's own apartment. *Id.* at 1154. The same observations could not be made in this case. Lewis actively resisted Officer Shaw's attempts to pull him off the road and to get Lewis' hands into a position where they could be handcuffed. Through his erratic behavior, including wandering into and through 45th Street, Lewis also showed that he constituted a threat to himself and potentially to others nearby.

Moreover, the amount of force used here is less than that in *Mercado*. In *Mercado*, the court noted that the officer "was aware that the [projectile launcher] was a lethal force if he shot at a subject from close range." *Id.* at 1158. By contrast, in this case there is no allegation or evidence that Officer Shaw knew at anytime that the force he used against Lewis could have led to his death. And though the Supreme Court has rejected a categorical distinction between deadly and non-deadly force, *see Scott v. Harris*, 127 S.Ct. 1769, 1777-78 (2007), the amount of force used in a particular case is obviously relevant to whether the use of force was reasonable.

When considered all together, the differences between *Mercado* and the instant case are too great for the court to conclude that any "broad principle"

created or referenced in *Mercado* was enough to give the officers in this case fair warning that their conduct violated the Constitution. Unlike this case, *Mercado* involved force known to the officer to be lethal, and a victim located in his own apartment, rather than on the street. Whatever the precise contours of the broad principle that *Mercado* may fairly be said to represent, it does not control this case. Thus, *Mercado* is insufficient to clearly establish the right allegedly violated in this case.

Finally, plaintiff argues that the officers' conduct was so egregiously excessive that any reasonable officer would have understood it to be unconstitutional, even in the absence of any relevant case law. *See Willingham v. Loughnan*, 321 F.3d 1299, 1302 (11th Cir. 2003); *Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir. 2002). The court disagrees.

This is precisely the kind of case in which the Eleventh Circuit has repeatedly cautioned district courts against second-guessing the decisions of police officers confronted with "circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 397; *see also Beshers*, 495 F.3d at 1266 (citing *Graham*); *Robinson v. Arrugueta*, 415 F.3d 1252, 1255-56 (11th Cir. 2005); *Vaughan v. Cox*, 343 F.3d 1323, 1331 (11th Cir. 2003) ("We are loath to second-guess the decisions made by police officers in the field."). The officers here were confronted by an agitated and uncooperative man with only a tenuous grasp on reality. Although the force used to restrain him may have been constitutionally excessive, the court cannot say that it was so obviously unconstitutional that, even in the absence of relevant case law, qualified immunity is inappropriate.

Thus, because plaintiff has not met her burden to show that the allegedly violated right was clearly established, the officers in this case are entitled to qualified immunity. The court will therefore grant the officers' motions for summary judgment.

c. Municipal Liability

Under § 1983, defendant City of West Palm Beach may be held liable for constitutional violations committed by its officers only if a municipal policy or custom is the moving force behind the violation. *See Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978). A municipality's failure to adequately train its officers may constitute such a policy. *City of Canton v. Harris*, 489 U.S. 378 (1989). Here, the plaintiff appears to allege three separate failures to train: 1) lack of training on how to properly interact with mentally ill persons; 2) lack of training on proper use of hobble restraints; and 3) deficient training as to the proper placement of an arresting officer's knee on an arrestee's back.

A municipality can be liable under an inadequate-training theory only where the lack of training reflects "deliberate indifference to the rights of persons with whom the police come into contact." *Bruce v. Beary*, 498 F.3d 1232, 1248-49 (11th Cir. 2007) (quoting *Harris*). Deliberate indifference generally may be established in two ways. First, the city is said to be deliberately indifferent if it is aware of a pattern of constitutional violations by its officers, yet nevertheless fails to adequately train them. *See Mercado*, 407 F.3d at 1161; *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County*, 402 F.3d 1092, 1116-1117 (11th Cir. 2005); *Riley v. Newton*, 94 F.3d

632, 638 (11th Cir. 1996). Second, even a single violation of federal rights may demonstrate a municipality's deliberate indifference, if the need for more or different training is so obvious that the municipality's policymakers effectively must have known of it. *See Board of County Com'rs of Bryan County v. Brown*, 520 U.S. 397, 409 (1997) (quoting *Harris*); *Gold v. City of Miami*, 151 F.3d 1346, 1352 (11th Cir. 1998).

Plaintiff acknowledged that it has not presented any evidence that there were any prior incidents of excessive force used by West Palm Beach police officers that would have alerted the city to a need for additional training. Instead, plaintiff relies on the second avenue to municipal liability described above. Plaintiff's main argument is that the danger of constitutional violations from the city's failure to adequately train its officers in the proper use of hobble restraints was so obvious that the city should be deemed deliberately indifferent to the risk of those violations.

The court cannot agree. Where the city is unaware of any pattern of constitutional violations, the plaintiff bears an extremely heavy burden to demonstrate the city's deliberate indifference. The plaintiff must show that the city knew "to a moral certainty" that constitutional violations would occur in the absence of additional or revamped training. *See Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1175 (11th Cir. 2001), *vacated on other grounds sub nom. Thomas v. Roberts*, 536 U.S. 953 (2002); *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1556 (11th Cir. 1989). Any causal connection between deficiencies in the city's training programs and the alleged constitutional

violation in this case is simply too remote. No policymaking official could reasonably be said to have known – certainly not "to a moral certainty" – that without training specifically directed to the use of hobble restraints, or to the appropriate use of officer's knees in restraining a struggling person, the city's police officers were likely to commit constitutional violations. Nor did the city's training policy with respect to confrontations with mentally ill persons reflect a conscious choice to ignore a risk "so obvious" that the city should be deemed deliberately indifferent, even without having been aware of any past constitutional violations. *See Young v. City of Augusta*, 59 F.3d 1160, 1172 (11th Cir. 1995) (finding that claims that prison officials were inadequately trained to treat mentally ill inmates "do not fit within this category").

Plaintiff has thus not produced sufficient evidence showing that the city was deliberately indifferent to the risk of constitutional violations. The court will accordingly grant the city's motion for summary judgment as to plaintiff's § 1983 claim.

2. Wrongful Death

Plaintiff also asserts a state-law wrongful death claim against the city. Plaintiff argues that the city is liable for the alleged negligence of its employees, resulting in Lewis' death.[5]

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[5] Although the city argues in its motion for summary judgment that it cannot be held liable for the negligent training of its police officers, plaintiff's claim appears to be that the city should be held liable for the negligent acts of its officers in the scope of their

Under Florida law, municipalities are generally immune from liability in tort. *See Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912, 917 (Fla. 1985); *Cauley v. City of Jacksonville*, 403 So.2d 379, 381-84 (Fla. 1981). However, Florida has partially waived this immunity by statute so that the city is liable "under circumstances in which the state or agency or subdivision,[6] if a private person, would be liable to the claimant, in accordance with the general laws of this state." *See* Fla. Stat. § 768.28(1).

When a municipality is sued in negligence, the court must first determine whether the facts alleged would subject a private person to liability under Florida law. *See Lewis v. City of St. Petersburg*, 260 F.3d 1260, 1262 (11th Cir. 2001) (citing *Kaisner v. Kolb*, 543 So.2d 732, 734 (Fla. 1989)). In Florida, a private employer is liable for the negligent acts of an employee occurring within the scope and course of employment. *See Fernandez v. Florida National College, Inc.*, 925 So.2d 1096, 1100 (Fla. 3d DCA 2006); *Burch v. Sun State Ford, Inc.*, 864 So.2d 466, 471 (Fla. 5th DCA 2004).

However, Florida law does not recognize a cause of action for the negligent use of force in making an arrest. *See City of Miami v. Ross*, 695 So.2d 486, 487 (Fla. 3d DCA 1997) (concluding that "there is no such cause of action as 'negligent' use of excessive force");

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duty, not that the city was itself negligent in training or hiring the officers. *See* Pl.'s Am Compl. ¶ 47.

[6] In this context, "state or agency or subdivision" includes municipalities. *See, e.g., Baldwin v. City of Fort Lauderdale*, 961 So.2d 1015, 1015 (Fla. 4th DCA 2007).

City of Miami v. Sanders, 672 So.2d 46, 48 (Fla. 3d DCA 1996) ("[I]t is not possible to have a cause of action for 'negligent' use of excessive force because there is no such thing as the 'negligent' commission of an 'intentional' tort."). The amended complaint in this case alleges that the officers' use of force was negligent, rather than intentionally excessive. *See* Pl.'s Am. Compl. ¶ 47 (alleging the "grossly negligent conduct of [the officers]"). It therefore fails to state a legally cognizable claim as to the officers, and there is thus no basis for the city's vicarious liability. Accordingly, the court will grant the city's motion for summary judgment as to plaintiff's wrongful death claim.

CONCLUSION

From the record evidence, a reasonable juror could conclude that the officers used constitutionally excessive force in their confrontation with Lewis. However, because plaintiff has not demonstrated that the allegedly-violated right was clearly established, the officers are entitled to qualified immunity and summary judgment on plaintiff's § 1983 claim. Plaintiff has further failed to show that the City of West Palm Beach was deliberately indifferent to the risk of the alleged violations. The city is therefore also entitled to summary judgment on the § 1983 claim. Finally, because Florida law does not recognize a cause of action for a police officer's negligent use of force in making an arrest, the city is entitled to summary judgment on plaintiff's wrongful death claim as well.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Plaintiff's motion for summary judgment [DE # 97] is **DENIED**.

2. Defendants' motions for summary judgment [DE # 91, 94, 95, 96, 98] are **GRANTED**.

3. Pursuant to Fed. R. Civ. P. 58(a), the court will enter final judgment by separate order.

4. Any motions not otherwise ruled upon are **DENIED AS MOOT**.

5. The Clerk of the Court is directed to enter this case as **CLOSED**.

DONE and **ORDERED** in Chambers in West Palm Beach, Florida, this 18th day of March, 2008.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
U.S. District Judge

Copies provided to counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-81139-CIV-HURLEY/HOPKINS

[Filed March 19, 2008]

LINDA LEWIS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CITY OF WEST PALM BEACH, et al.,	)
	)
Defendants.	)
	)

FINAL JUDGMENT

THIS CAUSE is before the court following the court's order granting defendants' motions for summary judgment. This court hereby enters judgment pursuant to Fed. R. Civ. P. 58 as follows:

FINAL JUDGMENT is entered against the plaintiff, Linda Lewis, who shall take nothing by this action, and in favor of the defendants, City of West Palm Beach, Florida, Raymond Shaw, Robert Leroy Root, III, Randall Maale, Thelton Luke, and Audrey Dunn, who shall go hence without day. This court reserves jurisdiction to award costs and attorneys' fees if appropriate.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 18th day of March, 2008.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States District Judge

Copies provided to counsel of record

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12348-AA

[Filed May 8, 2009]

LINDA LEWIS, as mother and personal representative of the estate of her son, Donald George Lewis, deceased,	)
Plaintiff-Appellant,	)
versus	)
CITY OF WEST PALM BEACH, FL, RAYMOND SHAW, ROBERT LEROY ROOT, III, RANDALL MAALE, et al.,	)
Defendants-Appellees.	)

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: DUBINA and CARNES, Circuit Judges, and GOLDBERG,* Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

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* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

No. 09-420

NOV 4 - 2009

In The

Supreme Court of the United States

LINDA LEWIS,

Petitioner,

v.

CITY OF WEST PALM BEACH, FLORIDA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts analyzed and applied the proper legal standards when determining whether the individual officers were entitled to qualified immunity.

LIST OF PARTIES

Petitioner, Linda Lewis (Lewis), the mother of the decedent Donald Lewis (Decedent) and the personal representative of the Estate of Donald Lewis was the Plaintiff in the district court action and was the appellant in the Eleventh Circuit.

Respondent, City of West Palm Beach, is a municipality in Palm Beach County, Florida and was a defendant in the district court action and an appellee in the Eleventh Circuit.

Respondents, individuals, were defendants in the district court action and were appellees in the Eleventh Circuit. They are:

Officer Raymond Shaw
Officer Thelton Luke
Officer Robert Leroy Root, III
Officer Audrey Dunn
Officer Randall Maale

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OPINIONS BELOW, JURISDICTION AND STATUTORY PROVISION INVOLVED

Respondents agree with the statement of the Opinions Below, Jurisdiction and Statutory Provision Involved as stated in the Petition.

STATEMENT OF THE CASE

Linda Lewis' Petition should be denied. The Eleventh Circuit's opinion represents the appropriate application of this Court's precedent to the facts of this case.

Linda Lewis (Lewis) petitions the Court for review of the Eleventh Circuit's March 11, 2009 decision affirming the district court's grant of summary judgment in favor of the City of West Palm Beach (City), Officer Raymond Shaw (Shaw), Officer Thelton Luke (Luke), Officer Randall Maale (Maale), Officer Robert Leroy Root, III (Root) and Officer Audrey Dunn (Dunn) on Lewis' Fourth Amendment excessive force, failure to train and state law wrongful death claims.

While in the custody of five police officers Donald Lewis died. Linda Lewis filed an 42 U.S.C. §1983 action against the City, Shaw, Luke, Root, Dunn and Maale, Langley Productions, Danny Jeffery and Zach

Ragsdale[1] in the United States District Court, Southern District of Florida on December 11, 2006, claiming that the City and the five individual officers violated Donald Lewis' right to be free from the use of excessive force in the course of a lawful seizure and that the City failed to adequately train its officers on the use of "hobble" cords.[2]

Also, Lewis asserted a state law wrongful death claim for the alleged gross negligence of the five individual officers.

In granting summary judgment in favor of Shaw, Luke, Root, Dunn and Maale, the district court recognized, pursuant to this Court's opinion in *Saucier v. Katz*, that the threshold question was whether Donald Lewis' constitutional rights were violated. App. 22a ("*See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (requiring courts to address the constitutional issue before the question of qualified

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[1] Langley Productions produces the television show "COPS." Danny Jeffery and Zach Ragsdale were part of the camera crew assigned by COPS to follow Officer Shaw. Danny Jeffery and Zach Ragsdale created a video recording of the entire incident, however, they were dropped from the lawsuit on November 29, 2007. The parties agree that the video is an accurate representation of the disputed events. App. 19a, n.1.

[2] "A hobble cord is a nylon strap with a metal snap at one end that can connect to a pair of handcuffs and a permanent loop on the other end that can secure ankles, knees, or elbows." *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1278, n.5 (11th Cir. 2004).

immunity")).[3] Accordingly, the court first addressed whether the officers violated Donald Lewis' Fourth Amendment rights.

The district court found that Donald Lewis posed a danger to himself, the officers and passing motorists; and that the application of a "hobble" was objectively reasonable; as was, generally, the use of force by the officers. The court, nevertheless, concluded that there was a genuine issue of material fact as to whether Shaw, Root and Luke violated Donald Lewis' rights under the Fourth Amendment by kneeling on Donald Lewis' upper back and neck after he was handcuffed and by pushing Donald Lewis' legs down toward his body in an awkward manner.

The district court next evaluated the individual officers, qualified immunity defense. The court noted that the plaintiff must show that the constitutional right was clearly established at the time of the alleged violation such that (1) it would be clear to a reasonable officer that his conduct was unlawful; or (2) it would ensure that the officers had fair warning that their conduct was unconstitutional. The court noted that there are three ways a constitutional right is clearly established under the Eleventh Circuit's framework: (1) a case with indistinguishable material

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[3] This Court recently receded from *Saucier v. Katz*, 533 U.S. 194 (2001), holding that courts need not first address the violation of constitutional rights before resolving qualified immunity claims. *Pearson v. Callahan*, 129 S.Ct. 808 (2009).

facts has been decided in the Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the pertinent state, (2) a case provides a broad statement of principle to "clearly establish" certain conduct as unconstitutional, and (3) the alleged conduct is so egregious that the right is clearly established in the absence of case law. Lewis conceded that there was no case, with facts even vaguely similar, holding that use of a hobble restraint or hog-tie[4] was unconstitutional. The court found untenable Lewis' argument that the Eleventh Circuit had provided a broad statement of principle making the use of hog-ties unreasonable. App. 32a ("When considered all together, the differences between *Mercado* and the instant case are too great for the court to conclude that any 'broad principle' created or referenced in *Mercado* was enough to give the officers in this case fair warning that their conduct violated the Constitution."). The court next concluded that the force used to restrain Lewis was not so obviously unconstitutional that, even in the absence of case law,

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[4] Petitioner uses the terms fetter, hobble and hog-tie interchangeably as words to describe the means used to secure Donald Lewis. The Eleventh Circuit has noted, however, that use of the word hogtie should be supported by sufficient evidence establishing the distance between the hands and the feet. *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1278, n.6 (11th Cir. 2004). Moreover, the Tenth Circuit has noted that a hog-tie restraint involves an individual's bound ankles being tied to his bound wrists with less than twelve inches between them; a distance of more than twelve inches is a hobble. *Weigel v. Broad*, 544 F.3d 1143, 1170 (10th Cir. 2008).

qualified immunity was inappropriate. Accordingly, the district court found that the officers were entitled to qualified immunity. The court entered summary judgment for Shaw, Luke, Root, Maale and Dunn.

The court next considered both Lewis' failure to train and wrongful death claims against the City. The court noted that a municipality's failure to adequately train its officers can constitute a municipal custom or policy where the lack of training reflects a deliberate indifference to the rights of people with whom the police come into contact. The court noted that deliberate indifference can be established when (1) the municipality is aware of a pattern of constitutional violations by its officers and fails to adequately train them; or (2) the need for more or different training is so obvious that the municipality's policymakers must have known of it. Lewis conceded there was no evidence of any prior incidents of excessive force that would have alerted the City to a need for additional training. The court rejected Lewis' argument that the City's alleged failure to adequately train its officers in the proper use of hobble restraints constituted deliberate indifference. App. 36a ("Plaintiff has thus not produced sufficient evidence showing that the city was deliberately indifferent to the risk of constitutional violations.").

The court next concluded that Lewis failed to state a Florida state law claim for excessive force. The court noted that Florida law does not recognize a cause of action for the negligent use of force in making an arrest. App. 37a ("the amended complaint

in this case alleges that the officers' use of force was negligent, rather than intentionally excessive. *See* Pl.'s Am. Compl. ¶47."). The court entered summary judgment for the City on both counts.

The Eleventh Circuit affirmed the district court's grant of summary judgment in favor of Shaw, Luke, Root, Dunn, Maale and the City. Citing this Court's opinion in *Pearson v. Callahan*, 129 S.Ct. 808 (2009), the Eleventh Circuit declined to examine the potential constitutional violation and instead analyzed whether the officers' conduct infringed a clearly established right. App. 6a ("The Supreme Court recognized that discussion of a constitutional violation may become unnecessary for qualified immunity purposes when the right was not clearly established. It is therefore not mandated that the Court examine the potential constitutional violation under *Saucier* step one prior to analyzing whether the right was clearly established under step two."). The court, however, expressly found that the officers use of a hog-tie in this case and in similar cases did not violate the Fourth Amendment. App. 10a ("Notably, in both the case at bar and as previously decided in *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1280 (11th Cir. 2004), hog-tying or "fettering" under the given circumstances does not violate the Fourth Amendment."); *See Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996).

Lewis claimed that the officers' restraint of Lewis with a hobble and eventual hog-tie after the need for any use of force had passed was so far beyond the hazy border between excessive and acceptable force

that the officers had to know they were violating the Constitution without case law on point. The court observed that Lewis was a safety risk to himself and others and that he never remained compliantly restrained. The court concluded that the officers' attempts to restrain Lewis were not so violent and harsh to be considered an egregious violation of a constitutional right. The court found that the officers were insulated by qualified immunity.

The court next addressed Lewis' claim that the City was liable under 42 U.S.C. §1983 for its failure to provide adequate law enforcement officer training on the use of hobbles. Lewis argued that the need for proper training on the use of hobbles and the proper placement of weight on an arrestee's back was "so obvious" that the City's failure to adequately train the officers amounted to deliberate indifference. The court rejected Lewis' argument. The court found that the proper use of the hobble restraint does not rise to the level of obvious probability for constitutional violations so as to create municipal liability. The court further noted that the City did provide training on the proper use of hobbles and that the City had a policy not to hog-tie arrestees. Accordingly, the court found that the City was not deliberately indifferent to a potentially obvious constitutional violation.

The court next rejected Lewis' claim of wrongful death because there is no cause of action in Florida for the negligent use of force.

The court affirmed summary judgment on all claims. Lewis now petitions this court for certiorari review.

REASONS FOR DENYING THE PETITION

The Petitioner has presented no compelling reasons for this Court to grant her Petition for Writ of Certiorari. See Sup. Ct. R. 10. The Petitioner incorrectly asserts that the court's decision in this case conflicts with the Fifth Circuit decision in *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998) and this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002).

The Eleventh Circuit properly evaluated qualified immunity in this case in a manner entirely consistent with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Hope* and its progeny. Thus, certiorari should be denied because any ruling in this case would not resolve any circuit conflict, nor add anything to the general jurisprudence regarding qualified immunity.

I. CERTIORARI IS NOT WARRANTED BECAUSE THE DECISION IN THIS CASE DOES NOT CONFLICT WITH THE FIFTH CIRCUIT'S DECISION IN *GUTIERREZ* OR THIS COURT'S DECISION IN *HOPE*.

The Eleventh Circuit's opinion in this case is not in conflict with the Fifth Circuit's decision in *Gutierrez,* nor this Court's decision in *Hope*.

It has been long recognized that "[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The right that the official is alleged to have violated must be clearly established, in a particularized rather than general sense, so that the official is on notice that the alleged conduct is unlawful. *Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987) ("[B]ut if the test of 'clearly established law' were to be applied [too generally], it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading."); *See Saucier v. Katz*, 533 U.S. 194, 206 (2001) ("Qualified immunity operates . . . to protect officers from the sometimes 'hazy border between excessive and acceptable force' . . . and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.").

This Court has recognized that some conduct, however, is so egregious that "[a] general constitutional rule may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held

unlawful.'" *Hope v. Pelzer*, 536 U.S. 730 (2002) (*citing Anderson*, *supra*, at 640).

The Eleventh Circuit's decision in this case is not in conflict with *Hope*. In deciding this case, the Eleventh Circuit observed, pursuant to this Court's precedent, that a right may be clearly established by specific case law; broad statements of principle within the constitution, statutes or case law; or through the obviously egregious nature of the conduct. App. 6a. The court affirmed summary judgment in this case because it found no precedent which, either specifically or broadly, established that an uncooperative detainee had a right not to be hobbled or hog-tied and because the officers' attempts to restrain Lewis were not so egregious that the officers should have known that their conduct was unconstitutional. App. 8a ("[T]he officers' attempts to restrain Lewis were not so violent and harsh to be considered an egregious violation of a constitutional right."). The court expressly noted, pursuant to Eleventh Circuit precedent, hog-tying under the circumstances of this case was not a constitutional violation. App. 10a ("Notably, in both the case at bar and as previously decided in *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1280 (11th Cir. 2004), hog-tying or 'fettering' under the given circumstances does not violate the Fourth Amendment."). Therefore, the Eleventh Circuit's ruling in this case properly applied this Court's precedent.

Likewise, the Eleventh Circuit's opinion is not in conflict with the Fifth Circuit. In *Gutierrez*, which

was decided before *Saucier*, *Hope* and *Pearson*, the Fifth Circuit found that material disputes of fact prevented them from determining whether officers' hog-tying an arrestee was objectively reasonable. The court noted that *Tennessee v. Garner*, 471 U.S. 1 (1985), clearly established that police use of deadly force, when the suspect does not pose a threat of serious physical harm, violated the Fourth Amendment. Thus the court, employing tenuous reasoning, suggested that qualified immunity could be denied if the plaintiff proved that using a hog-tie restraint, under the circumstances, constituted deadly force.[5] The court found that the general test set out in *Garner* gave fair warning to the officers that use of any police weapon could constitute deadly force.

This Court, however, expressly rejected such reasoning in *Brosseau v. Haugen*, 543 U.S. 194 (2004), finding that it is a mistake to find fair warning in the general test set out in *Garner*. This Court reasoned that *Garner* is "cast at a high level of generality" and can only clearly establish fair warning in an obvious clarity case similar to *Hope*. Thus, Petitioner's reliance on *Gutierrez* is misplaced.

Assuming *arguendo* that Petitioner is correct that the Eleventh Circuit's opinion conflicts with the

---

[5] The Fifth Circuit later emphasized that its major concern in *Gutierrez* was the danger of the hogtie restraint when coupled with a lack of monitoring. *Sanders-Burns v. City of Plano*, 578 F.3d 279, 292, n.6 (5th Cir. 2009).

Fifth Circuit's opinion, it is unfair to expose police officers to civil liability due to disagreement among judges on a constitutional question. *Pearson v. Callahan*, 129 S.Ct. 808, 823 (2009) ("'[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.'"). The Petitioner effectively seeks a ruling that all hobble restraints are unconstitutional, however, two other circuit courts of appeal have expressly declined to do so. *Weigel v. Broad*, 544 F.3d 1143, 1170 (10th Cir. 2008), *cert. denied*, *Broad v. Weigel*, 129 S.Ct. 2387 (2009) (O'Brien, J., dissent) ("In *Cruz* we expressly did not forbid all hog-ties let alone the less restrictive hobble."); *Mayard v. Hopwood*, 105 F.3d 1226 (8th Cir. 1997) (finding use of a hobble reasonable where individual resisted arrest).

Notably, this case differs from "gratuitous force" cases decided in the Eleventh and other circuits because Donald Lewis continued to struggle and was never compliant after he was restrained.

Accordingly, Petitioner cannot deny that the Eleventh Circuit properly analyzed and applied the proper legal standards set out by this Court regarding the applicability of qualified immunity. Thus, Petitioner's disagreement is with the application of this Court's precedent to the facts of this case.

CONCLUSION

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 09-420

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In The Supreme Court of the United States

LINDA LEWIS, AS MOTHER AND PERSONAL REPRESENTATIVE OF THE ESTATE OF HER SON, DONALD GEORGE LEWIS,

Petitioner,

v.

CITY OF WEST PALM BEACH, FLORIDA; RAYMOND SHAW; ROBERT LEROY ROOT, III; RANDALL MAALE; THELTON LUKE; AND AUDREY DUNN, POLICE OFFICERS FOR THE CITY OF WEST PALM BEACH POLICE DEPARTMENT, IN THEIR INDIVIDUAL CAPACITIES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit's decision in *Lewis v. City of West Palm Beach, Fla.*, 561 F.3d 1288 (11th Cir. 2009) on the subject of municipal liability for the failure to train police officers on the use and application of hobbles conflicts with the Tenth Circuit's opinion in *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001), and if so, does the conflict create "a deep and abiding schism" among the federal Circuits justifying a grant of certiorari to the United States Supreme Court.

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STATEMENT OF THE CASE

Petitioner Plaintiff-Appellant Linda Lewis ("Petitioner") seeks a writ of certiorari from this Court for the review of the Eleventh Circuit's March 11, 2009, decision in *Lewis v. City of West Palm Beach, Fla.*, 561 F.3d 1288 (11th Cir. 2009), affirming the district court's grant of summary judgment in favor of Respondents City of West Palm Beach ("City" or "Respondent City") and its police officers Raymond Shaw, Robert Leroy Root, III, Randall Maale, Thelton Luke and Anthony Dunn, in their individual capacities[1] because she believes a conflict worthy of this Court's grant of certiorari was created by the Tenth Circuit's decision in *Cruz v. City of Laramie,* 239 F.3d 1183 (10th Cir. 2001) regarding municipal liability for the failure to train police officers on the safe application of hobble restraints.

The procedural history of this case reveals that on December 11, 2006, Petitioner filed a civil rights action (amended on February 15, 2007) against City and five of its police officers[2] on behalf of the estate of her son, Donald George Lewis, as a multi-count wrongful-death complaint alleging numerous deprivations of his constitutional rights under color of state law in violation of 42 U.S.C. § 1983 and Florida

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[1] Respondent Police Officers filed a separate brief in opposition.

[2] Langley Productions, producers of the television show "COPS," and two of its employees were Defendants that were dismissed pursuant to settlements.

Statute § 768.28. Petitioner's claim against Respondent City centered on 42 U.S.C. § 1983 allegations of municipal liability for the failure to adequately train its police officers on the use and application of hobbles.

On March 18, 2008, the district court granted summary judgment in favor of City and the individual police officers and denied Petitioner's motion for summary judgment. As it relates to the municipal liability claim, the District Court specifically found that the City was not deliberately indifferent to a need for training. The District Court found that there was no notice to the City relative to a likelihood of constitutional deprivation. The District Court also found that the City did train. On April 28, 2008, Petitioner's motion under Fed. R. Civ. P. 59 (e) to alter the district court's judgment was denied.

An appeal to the Eleventh Circuit followed, wherein the appellate court in *Lewis v. City of West Palm Beach, Fla.*, 561 F.3d 1288 (11th Cir. 2009), affirmed summary judgment in favor of Respondents on both claims against City. The court addressed Petitioner's claim that the City was liable under 42 U.S.C. § 1983 for its failure to provide adequate law enforcement officer training on the use of hobbles. Petitioner argued that the need for proper training on the use of hobbles and the proper placement of weight on an arrestee's back was "so obvious" that the City's failure to adequately train the officers amounted to deliberate indifference. The court rejected Petitioner's argument. The court found that the proper use of the

hobble restraint does not rise to the level of obvious probability for constitutional violations so as to create municipal liability. The court further noted that the City did provide training on the proper use of hobbles and that the City had a policy not to hogtie arrestees. Accordingly, the court found that the City was not deliberately indifferent to a potentially obvious constitutional violation. Rehearing and rehearing *en banc* were denied. Petitioner now seeks this Court's certiorari review.

REASONS FOR DENYING THE PETITION

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS BETWEEN THE TENTH AND ELEVENTH CIRCUITS ON THE ISSUE OF MUNICIPAL LIABILITY FOR FAILURE TO TRAIN

Petitioner relies on *Cruz v. City of Laramie,* 239 F.3d 1183 (10th Cir. 2001) to argue that this Court should grant certiorari in this case, pursuant to Sup. Ct. R. 10 (a), to resolve a purported split between the Eleventh Circuit and the Tenth Circuit regarding municipal liability for the failure to train police officers on the safe application of hobble restraints. The opinions rendered by these two appellate courts on this issue fails to present a question worthy of certiorari, and therefore, the petition for writ of certiorari should be denied.

Rule 10 (a) of the Supreme Court provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;

Sup. Ct. R. 10 (a). For purposes of Rule 10, a conflict must be a real or "intolerable" conflict on the same matter of law or fact, not merely an inconsistency in dicta or in general principles utilized. Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, Seventh Edition, page 167. Further, if resolution of an alleged "clear conflict" would have no bearing upon the ultimate outcome of the case before the Court, certiorari review should be denied. *See, e.g.*, *Sommerville v. United States*, 376 U.S. 909 (1964). These principles illustrate that this Petition fails to present the type of circuit split on an issue of national importance that warrants the United States Supreme Court's attention for compelling reasons.

All that is presented by this Petition is Petitioner's disagreement with the result achieved by the Eleventh Circuit when it applied the settled law in

that jurisdiction to the facts presented in her case. Petitioner apparently believes she would have faired better had the Tenth Circuit reasoning in *Cruz v. City of Laramie,* 239 F.3d 1183 (10th Cir. 2001) been utilized to resolve her failure to train claim against Respondent City. In fact, the *Cruz* decision has no impact on the issue of municipal liability for the failure to train on the use of hobble restraints because all the Tenth Circuit held was that the denial of summary judgment was appropriate on the municipal liability question as the record presented genuine issues of material fact:

> Generally, "the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." [footnote omitted] With respect to a showing of "deliberate indifference," the district court determined that material issues of fact precluded summary judgment. The court cited evidence that the City failed to train its officers on the use of hobble restraints and that the City put such restraints in its police cars. The court also noted that high ranking officials were aware of positional asphyxia attributable to hobble restraints and of a doctor's report stating that "deaths in police custody with hog-tie restraint[s] have been reported in medical literature a number of times." The district court found that genuine issues of material fact were in dispute. The denial of summary

> judgment to the City therefore was appropriate.

Id. at 1194. Such a conclusory analysis underscores the fact that the municipal liability issue raised by Petitioner was not considered by the Tenth Circuit. *Cruz* did not articulate a clear standard for courts to follow with respect to municipal liability. Thus, no conflict can be demonstrated between the two circuits.

On the other hand, the Eleventh Circuit provided the analytical direction that was absent in *Cruz* by specifically concluding:

> "Because the City of West Palm Beach did not maintain a deliberate indifference to a potentially obvious constitutional violation and because the City provides some training on the use of hobbles, the City cannot be liable under 42 USC 1983". *Lewis v. City of West Palm Beach,* 561 F.3d 1288 (11th Cir. 2009).

The Eleventh Circuit based this conclusion on the finding that petitioner failed, as a matter of law, to establish that the City was on notice of a need to train. The Eleventh Circuit went into a detailed discussion of the elements necessary to establish deliberate indifference on the part of a municipality. The appellate court correctly pointed out that a necessary element of deliberate indifference is notice to the municipality of a problem relative to constitutional deprivations. The Eleventh Circuit pointed out that there were two ways to establish the requisite notice to the City necessary for a finding of deliberate

indifference. The first way to establish notice was to present evidence showing a pattern of constitutional violations within the specific agency. The second way to establish notice requires an activity that has such a high likelihood for constitutional violation that the need to train would be obvious. The Eleventh Circuit accurately pointed out that the Petitioner's position rests on the latter. In concluding, as a matter of law there was no notice to the City, the Eleventh Circuit found that the restraint techniques used in this case (use of hobble and positioning of the knee) did not rise to a level that would "carry a high probability for constitutional violation in the manner intended by the 'so obvious' notice that would open the door to municipal liability." *Id.*

Considering the clearly articulated reasoning of the Eleventh Circuit in *Lewis*, the *Cruz* opinion simply does not stand in obvious conflict with the Eleventh Circuit's conclusions to the extent necessary to warrant the Supreme Court's attention. The *Cruz* opinion, by and large, addresses issues relative to the qualified immunity of individual officers. The *Cruz* court comes to the very end of the opinion and dedicates one relatively short paragraph to conclude that because the trial court found that there were genuine issues of material facts in dispute, the decision to deny summary judgment to the municipality should stand. The *Cruz* court specifically opined that because the trial court cited evidence that the City failed to properly train its officers and that the City was on actual notice of a link between the use of

hobbles and positional asphyxia, that it was appropriate to deny the City's motion for summary judgment. Unlike the Eleventh Circuit's opinion, the Tenth Circuit's opinion contains no clearly articulated or in-depth discussion relative to the standard for determining the requisite notice necessary to establish deliberate indifference on the part of a municipality.

The Tenth Circuit concluded that denial of summary judgment regarding municipal liability was appropriate because genuine issues of material fact were in dispute. The Eleventh Circuit concluded that granting summary judgment regarding municipal liability was appropriate because there were no genuine issues of material fact in dispute regarding the City's training of its police officers. Nowhere in the Tenth Circuit opinion can it be read that the Tenth Circuit's articulation of the legal standard regarding municipal liability would be any different than the Eleventh Circuit's. Based on the foregoing, there is not an apparent "deep divide" between the Eleventh and Tenth Circuits and therefore no compelling reason for the Supreme Court to hear this case.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE EVEN ASSUMING PETITIONER'S CLAIM AS TRUE, THE RESPONDENT CITY WOULD STILL PREVAIL

Petitioner's claim against Respondent City before the lower courts in this case centered on her accusation that the need for training on the proper use of hobble restraints and the proper placement of weight on an arrestee's back during the restraint process is "so obvious" that it required proactive training by the City to ensure avoidance of constitutional violations. *Lewis*, 561 F.3d at 1293. The Eleventh Circuit rejected this charge, reasoning:

> In establishing this form of notice, the Supreme Court referenced the proper use of firearms and the correct use of deadly force as an area that would be so obvious as to require adequate training by the municipality to avoid liability. *City of Canton,* 489 U.S. at 390 n. 10, 109 S.Ct. 1197. In comparison, this Court refused to acknowledge the proper response to handcuff complaints as so obvious as to put the municipality on notice that training is required. *Gold,* 151 F.3d at 1352. Similarly, the application of a hobble does not rise to the level of obviousness reserved for "a narrow range of circumstances [where] a violation of federal rights may be a highly predictable consequence" of a failure to provide adequate training. *Bd. of County Comm'rs of Bryan County, Okla. v. Brown,*

520 U.S. 397, 409, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). Despite the questionable use of the hobble in this particular situation, hobbles do not have the same potential flagrant risk of constitutional violations as the use of deadly firearms. Failure to provide training on hobbles is not a "particular glaring omission in a training regimen." *Id.* at 410, 117 S.Ct. 1382. Notably, in both the case at bar and as previously decided in *Garrett v. Athens-Clarke County,* 378 F.3d 1274, 1280 (11th Cir.2004), hogtying or "fettering" under the given circumstances does not violate the Fourth Amendment. The City is therefore unlikely to be on notice of its potential legal ramifications in this context. Thus, the hobble, and the understanding of its proper application, does not carry a high probability for constitutional violations in the manner intended by the "so obvious" notice that would open the door to municipal liability.

Additionally, the City of West Palm Beach does provide training on the use of the hobble. In resolving the issue of the City's liability, "the focus must be on the adequacy of the training programs in relation to the tasks the particular officers must perform," and not merely on the training deficiencies for a particular officer. *Canton,* 489 U.S. at 390, 109 S.Ct. 1197. It is thus irrelevant what training each specific officer present at the scene was given or retained. Training Officer Gerald MacCauley testified that the City of West Palm Beach provides regular

> training on the use of force, and additionally provides specific training on the use of hobbles. The officers are also told that the proper placement of pressure or weight placed on an individual while restraining them should be on the back, near the shoulder blades, and not on the neck area. Officer MacCauley further emphasized that it is department policy not to hogtie arrestees; however it is acceptable to bring the ankles near the wrists briefly, if necessary, while attaching the hobble. While not under a specific constitutional duty under §1983, the City takes actions to ensure that arrestees are not subjected to unnecessary or painful procedures when restrained.
>
> Because the City of West Palm Beach did not maintain a deliberate indifference to a potentially obvious constitutional violation and because the City provides some training on the use of hobbles, the City cannot be held liable under 42 U.S.C. §1983.

Id. at 1293-94. Hence, even if this Court were to enunciate a new and more stringent standard relating to the notice elements of deliberate indifference, the City would still have prevailed in the courts below because the Eleventh Circuit held that the City had no notice that it had a constitutional duty to train based on the clear standards articulated in case law at the time. For this Court to now articulate a different or more stringent standard would not change the notice scenario that the Respondent faced at the time of the incident.

Additionally, the City would still prevail based on the finding in the trial court, as well as the opinion of the Eleventh Circuit, that, because "the City provides some training on the use of hobbles, the City cannot be held liable under 42 U.S.C. §1983." *Id.* It is important to note that the court in *Cruz* pointed out that the lower court found there was evidence that the police agency failed to train on the use of hobbles. In the instant case, both the district and circuit courts concluded training on the use of hobbles was provided.

Significantly, even if the court were to change the standard relating to municipal liability and establish a "per se" notice standard regarding the use of hobbles, it is important to note that Petitioner's forensic expert's opinion does not link the cause of death to hobble use. As the Petition notes, Petitioner's forensic expert has opined that "Donald Lewis' death was asphyxia due to neck compression." The *Cruz* case does not even mention "neck compression", it only addresses use of hobbles.

CONCLUSION

Petitioner has failed to establish any compelling reason for this Court to grant her Petition for Writ of Certiorari. Accordingly, because no conflict exists between the Tenth and Eleventh Circuits on the issue of municipal liability, the Petition for Writ of Certiorari should be denied.

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